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APPENDIX A — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 14, 1998

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 96-35715
CT/AG#: CV-95-06103-TMC

ROSELLA E. BURNS; TIMOTHY RAY KEENER; TED-HYUN KIM; EMIL MARTIN; BELLE MCGOVERN; BRENDA L. MIOTKE; KEITH MIOTKE; WILLIAM PARKER; LAVERN RHODES; ORRIN SAVAGE; LARRY VETTER

Plaintiffs-Appellants

v.

STONE FOREST INDUSTRIES INC

Defendant-Appellee

APPEAL FROM the United States District Court for the District of Oregon (Eugene).

THIS CAUSE came on to be heard on the Transcript of the Record of from the United States District Court for the District of Oregon (Eugene) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 07/14/98

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROSELLA E. BURNS; TIMOTHY RAY KEENER; TED-HYUN KIM; EMIL MARTIN; BELLE MCGOVERN; BRENDA L. MIOTKE; KEITH MIOTKE; WILLIAM PARKER; LAVERN RHODES; ORRIN SAVAGE; LARRY VETTER,
Plaintiffs-Appellants,

v.

STONE FOREST INDUSTRIES, INC.,
Defendant-Appellee.

No. 96-35715
D.C. No.
CV-95-06103-TMC
OPINION

Appeal from the United States District Court,
for the District of Oregon
Thomas M. Coffin, Magistrate Judge, Presiding

Argued and Submitted
September 11, 1997—Portland, Oregon

Filed July 14, 1998

Before: William C. Canby, Jr., Thomas G. Nelson, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Andrew J. Kleinfeld

SUMMARY

Labor and Employment/Compensation

The court of appeals affirmed a judgment order of the district court. The court held that under the Worker Adjustment

and Retraining Notification Act (WARN), employees who are deprived of 60 days notice of a plant closure are entitled to receive pay only for work days during that period.

On September 26, 1994, appellee Stone Forest Industries, Inc. notified employees of its plywood mill that the plant would close down two days later. Stone Forest advised the employees that they would be paid until November 26, 61 days after the notice, based on what they had worked before the shutdown.

Appellant Rosella Burns and other employees brought a class action against Stone Forest, alleging that under WARN, they were entitled to be paid for each calendar day during the last 60 days, not just each workday. There were 18 fewer workdays than calendar days in the 60-day period.

The district court ruled that the employees were entitled to pay for only workdays during the 60-day period. The employees appealed.

[1] The statute made the company liable for "back pay for each day of violation" to be "calculated for the period of the violation, up to 60 days." The reading favorable to the company was that "back pay" means what the employees would have been paid had the violation not occurred. The reading favorable to the workers was that "for each day of violation" means pay for every calendar day during the period, not just every workday. The case could not be resolved by reading the words and looking up definitions because a literal reading of the statute allows for either. [2] It made no sense to parse the ambiguous legislative history.

[3] The preferable way to resolve linguistic ambiguity is to evaluate the alternative readings in light of the purpose of the statute. [4] The statute is a wage workers' equivalent to business interruption insurance. A worker is entitled to be warned before his plant shuts down unless a statutory exception

applies. [5] In line with that purpose, it made sense to require the company to pay the worker for 60 workdays. [6] It did not make sense to require the company to pay him for calendar days without regard to workdays because the stream of income would be arbitrarily long for some workers and short for others. The large difference is arbitrary relative to the statutory purpose.

[7] Another reason why the workdays approach makes more sense is that the calendar days construction would put financial pressure on the company to reduce expense in a way that would hamper workers' opportunities to search for new jobs. The company could avoid liability by requiring workers to come in every workday during the 60-day notice period, and tell them to sit and waste time in a plant that produces nothing. Courts should not choose a construction of ambiguous statutory language that would attribute irrationality to Congress.

[8] The workdays approach was a good literal reading. The statute says that the company must pay "back pay" for every day of the violation period. The term "back pay" for employees has traditionally been understood to mean "a sum equal to what they normally would have earned" had the violation not occurred. [9] The district court did not err in dismissing the WARN claim.

COUNSEL

Megan Glor, Swanson, Thomas & Coon, Portland, Oregon, for the plaintiffs-appellants.

Joel H. Spitz, Ross & Hardies, Chicago, Illinois, for the defendant-appellee.

Kary L. Moss and Lamont Satchel, Maurice and Jane Sugar Law Center, Detroit, Michigan, for amici curiae International

Appendix A

Brotherhood of Teamsters, Laborers International Union of North America, United Electrical, Radio and Machine Workers of America, United Food and Commercial Workers Union, United Mineworkers International Union, Union of Needletrades, Industrial and Textile Employees.

OPINION

KLEINFELD, Circuit Judge:

The only significant issue in this case is whether employees deprived of 60 days notice of a plant closing are entitled to get paid for each of the 60 days, or for what would have been work days during the 60 days. The Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq., controls. We join most of the other circuits that have ruled on the issue in construing the statute to mean work days.

FACTS

Because of restrictions on timber supply and rising costs, Stone Forest Industries shut down its plywood mill in Albany, Oregon. The company told the employees on September 26, 1994, that the mill would close two days later, September 28, but that they would be paid until November 26, 61 days after the notice. They could pick up their paychecks each payday at the personnel office. Even though the mill would be closed and they would not be working, they would get paid during the 61 days, measured by what they had worked before the shutdown, with benefits and vacation pay to be cashed out with their final paychecks.

The full time employees brought a class action for additional pay. Their theory was that they should get paid for each calendar day during the last 60 days, not just each work day. The magistrate judge opined that they were entitled only to be

paid for the work days, and because the company had paid them fully for all work days, they were entitled to no damages for the company's failure to give them the required 60 days notice before the mill shut down. The district court accepted the magistrate judge's recommendation, and granted summary judgment to the company. The workers appeal. No party asserts that there are any issues of fact.

ANALYSIS

Congress passed a law in 1988 saying that "[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice. . . ." 29 U.S.C. § 2102(a).

The statute carefully delineates the liability of employers who violate its terms, and provides that the remedies listed are "exclusive." 29 U.S.C. § 2104(b). The remedy relevant to the case at bar is "back pay for each day of violation" "for the period of the violation":

> **(a) Civil actions against employers**
>
> (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —
>
> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

> (ii) the final regular rate received by such employee;
>
> . . .
>
> Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

29 U.S.C. § 2104(a)(1). The employer's liability is reduced by wages and other payments the employer makes to the laid off employees for the period of the violation. 29 U.S.C. § 2104(a)(2). Civil penalties of not more than $500 per day may be imposed in some circumstances, on top of the back pay. 29 U.S.C. § 2104(a)(3). This appeal does not raise any question of liability for a penalty.

There were 18 fewer work days than calendar days in the 60 day period at issue. The period included about nine weeks, spanning 17 weekend days and Thanksgiving. The company paid the workers the rate to which they would have been entitled for all work days, but not for calendar days within the 60 day period that would not have been work days. The money at stake is what the workers would have been paid, had their hourly rates applied to those 18 non-work days.

[1] The statute makes the company liable for "back pay for each day of violation" to be "calculated for the period of the violation, up to a maximum of 60 days." The reading favorable to the company is that "back pay" means what the employees would have been paid, had the violation not occurred. The reading favorable to the workers is that "for each day of violation" and "calculated for the period of the violation" means pay for every calendar day during the period, not just every work day. Each side makes a "plain language" argument. We cannot resolve the case simply by reading the words and looking up their definitions, because a

literal reading of the words and syntax of the statute allows for either reading.

[2] One approach to this form of ambiguity is to look to legislative history. "As is often the case, the legislative history is more indeterminate in its meaning than the statute itself." *United States v. Baird,* 85 F.3d 450, 454 (9th Cir. 1996). The Senate Report supports the work days analysis: "wages . . . the employee would have received had the plant remained open." S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987). The House Report is less clear, but seems to favor the calendar days analysis: "for each day of violation, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988). Neither formulation was passed by both houses and was signed by the president, so neither formulation is the law. *See Puerta v. United States,* 121 F.3d 1338, 1344 (9th Cir. 1997). It makes no sense to parse the ambiguous legislative history as though it were the law.

[3] The preferable way to resolve linguistic ambiguity is to evaluate the alternative readings in light of the purpose of the statute. *See Sacks v. Commissioner,* 69 F.3d 982, 992 (9th Cir. 1995). "We must examine the meaning of the words to see whether one construction makes more sense than the other as a means of attributing a rational purpose to Congress." *Longview Fibre Co. v. Rasmussen,* 980 F.2d 1307, 1311 (9th Cir. 1992). Law is more complex and interesting than algebra, because the words are not mere symbols to be manipulated, but expressions of human purposes to be served.

[4] The statute is a wage workers' equivalent of business interruption insurance. It protects a worker from being told on payday that the plant is closing that afternoon and his stream of income is shut off, though he has to buy groceries for his family that weekend and make a mortgage payment the next week. The name of the act is a somewhat strained attempt to

come up with a good acronym, WARN, suggesting its purpose, "Worker Adjustment and Retraining Notification Act," P.L. 100-379 § 1. A worker is entitled to be warned before his plant shuts down, unless one of the statutory exceptions applies.

[5] In line with that purpose, it makes perfect sense to require the company to pay the worker for 60 work days. That means his stream of income continues to flow for 60 days after he knows the plant will shut down, so he has two months to look for a new job, perhaps in a new town if the plant shutdown decimated employment in his town.

[6] It does not make sense to require the company to pay him for calendar days without regard to work days, because the stream of income would be arbitrarily long for some workers and short for others. Under the calendar days approach, someone who worked 4 10-hour shifts in a week would replace a much longer stream of income than someone who worked 5 8-hour shifts per week. The 4 10s worker would get 10 hours times 60 days, 600 hours of pay. The 5 8s worker would get 8 hours times 60 days, 480 hours of pay. But that is 15 weeks of income for the 4 10s worker, 12 weeks for the 5 8s worker. The large difference is arbitrary relative to the statutory purpose. Under the work days approach, both workers get what they would have earned in the two-month notice period, were there to be no shutdown. That serves the statutory purpose of providing a two-month uninterrupted income stream facilitating a job search.

[7] Another reason why the work days approach makes more sense is that the calendar days construction would put financial pressure on the company to reduce expense in a way that would hamper the workers' opportunities to search for new jobs. The company in this and any case could avoid liability by requiring the workers to come in every work day during the 60-day notice period, and tell them to sit and waste time in a plant that produced nothing. But if the company

closes the plant and tells the workers to come in for their paychecks and otherwise feel free to look for work, retrain, or do as they like during the 60-day period, then under the workers' theory in this case, it has to pay them for weekends and holidays. Indeed, Stone Forest, the defendant in this case, did exactly what the more sensible alternative describes. Congress was trying to make a shutdown less painful for the workers, yet the construction urged by the workers and the amici in this case would make a shutdown more painful, by discouraging employers from letting workers use the 60-day notice period to search for new jobs. We should not choose a construction of ambiguous statutory language that would attribute irrationality to Congress, where the words also lend themselves to a sensible construction.

[8] The work days approach is a good literal reading. The statute says that the violating company must pay "back pay" for every day of the violation period. The term "back pay" for employees has traditionally been understood to mean "a sum equal to what they normally would have earned" had the violation not occurred. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1941). The 4 10s worker normally would have earned compensation for about 9 weeks, 360 hours, in a 60 day period, not 600 hours. The 5 8s worker, likewise 360 hours, not 480. The "back pay" for a day that a worker would not have worked had there been no violation would be zero.

Although this is a case of first impression for us, several other circuits have decided the question raised. The Third Circuit tackled the question first, and adopted the calendar days construction favored by the workers. *United Steelworkers of America v. North Star Steel Co.,* 5 F.3d 39, 43 (3d Cir. 1993). But three other circuits, the Fifth, Sixth and Tenth, have subsequently rejected the Third Circuit's reasoning and result, and adopted the work days approach. *Carpenters Dist. Council of New Orleans v. Dillard Dept. Stores, Inc.,* 15 F.3d 1275, 1283-85 (5th Cir. 1994); *Saxion v. Titan-C-Manufacturing, Inc.,* 86 F.3d 553, 560-61 (6th Cir. 1996); *Frymire v. Ampex*

Corp., 61 F.3d 757, 771-72 (10th Cir. 1995). We agree with the critique the other circuits have made of the Third Circuit construction, and with the Tenth Circuit's observation that the legislative history "remain[s] susceptible to the same multiple interpretations" as the statutory language. *Frymire*, 61 F.3d at 771.

[9] The workers argue that the district court erred in holding that the "good faith" provision of 29 U.S.C. § 2104(a)(4) applied, but we need not reach the issue, because of our conclusion on the work days or calendar days issue. The workers also argue that the district court erred in declining to exercise supplemental jurisdiction over their state law claim under the Oregon Wage Law, ORS § 652.140, but only "because the district court erred in dismissing plaintiff's WARN Act claim." Because we have held that the district court did not err in dismissing the WARN Act claim, this contention need not be considered further.

AFFIRMED.

APPENDIX B — JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED MAY 14, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 95-6103-TC

ROSELLA E. BURNS, TIMOTHY RAY KEENER, TED-HYUN KIM, EMIL MARTIN, BELLE MCGOVERN, BRENDA L. MIOTKE, KEITH J. MIOTKE, WILLIAM D. PARKER, LAVERN RHODES, ORRIN SAVAGE, AND LARRY VETTER,

Plaintiff,

v.

STONE FOREST INDUSTRIES,

Defendant.

JUDGMENT

This action is dismissed.

Dated: May 14, 1996

Donald M. Cinnamond, Clerk

s/ Christy Weller
by Christy Weller, Deputy

JUDGMENT **DOCUMENT NO: 52**

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 95-6103-TC

ROSELLA E. BURNS, TIMOTHY RAY KEENER, TED-HYUN KIM, EMIL MARTIN, BELLE MCGOVERN, BRENDA L. MIOTKE, KEITH J. MIOTKE, WILLIAM D. PARKER, LAVERN RHODES, ORRIN SAVAGE, AND LARRY VETTER,

Plaintiff,

v.

STONE FOREST INDUSTRIES,

Defendant.

ORDER

Magistrate Judge Thomas M. Coffin filed Findings and Recommendation on March 21, 1996, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Coffin's rulings.

Appendix B

I find no error. Accordingly, I ADOPT Magistrate Judge Coffin's Findings and Recommendation filed March 21, 1996, in its entirety.

IT IS SO ORDERED, defendant's motion (#35) for summary judgement as to plaintiffs' WARN Act claim is granted and plaintiffs' motion (#33) for partial summary judgement is denied. In addition, plaintiffs' state law claim is dismissed and this action is dismissed.

DATED this 13th day of May, 1996.

s/ [Michael R. Hogan]
UNITED STATES DISTRICT JUDGE

APPENDIX C — FINDINGS AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED MARCH 26, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 95-6103-TC

ROSELLA E. BURNS, TIMOTHY RAY KEENER, TED-HYUN KIM, EMIL MARTIN, BELLE MCGOVERN, BRENDA L. MIOTKE, KEITH J. MIOTKE, WILLIAM D. PARKER, LAVERN RHODES, ORRIN SAVAGE, AND LARRY VETTER,

Plaintiff,

v.

STONE FOREST INDUSTRIES,

Defendant.

FINDINGS AND RECOMMENDATION

COFFIN, Magistrate Judge:

Plaintiffs bring this class action under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109, (WARN) alleging defendants failed to provide the required notice of the shutdown of its Albany, Oregon plywood mill. Plaintiffs also claim that defendant failed to pay them their earned wages at the time of their discharge as required by the Oregon Wage Claim Act, ORS § 652.140. Presently before the court are defendant's motion (#35) for

summary judgment and plaintiffs' motion (133) for partial summary judgment.

FACTUAL BACKGROUND

Plaintiffs are former hourly-rate employees of defendant Stone Forest Industries' Albany, Oregon plywood mill who lost their jobs as a result of the mill's shutdown. Defendant, as a result of restrictions on timber supply and rising costs, decided to permanently shut down its Albany Mill on September 28, 1994. Defendant gave notice to its hourly employees on September 26, 1994.[1]

Following the shutdown, defendant provided each hourly employee with full benefits including health insurance coverage and contributions to the employees' retirement plan for a sixty day period concluding November 26, 1994. In addition, defendant provided each employee with pay, on regular paydays, for each day the employees would have worked in the sixty day period.[2] Each employee's shutdown pay was calculated at the higher of (1) the employee's rate of regular pay at the time of the shutdown, or (2) the employee's average rate of regular pay for the period from August 1, 1994 to

1. Defendant also gave notice to local and state government officials On September 26, 1994 and to the Dislocated Worker Unit of the Oregon Development Department on September 27, 1994.

2. There were forty-two work days in the sixty day period following the shutdown. Approximately forty-five employees agreed to work after the shutdown to complete production and clean and close the mill. After their last day of work, the employees who agreed to work after the shutdown received shutdown pay for the remaining days in the sixty day period. In addition, the post-shutdown employees received an extra day of pay for each day they worked after the shutdown.

September 28, 1994. For each workday in the sixty day period, each employee received overtime shutdown pay for the average number of hours the employee worked per day during the August 1, 1994 through September 28, 1994 period. The overtime pay was calculated at the higher of (1) the employee's rate of overtime pay at the time of the shutdown, or (2) the employee's average rate of overtime pay for the period from August 1, 1994 to September 28, 1994. Furthermore, each hourly employee continued to accrue vacation pay during the sixty days, which was paid in a lump sum at the conclusion of the sixty day period.

STANDARDS

Summary judgment is appropriate where "there is no genuine issue as to any material fact and. . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Rule 56 (c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with

respect to which she has the burden of proof. *Id.* at 32. There is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355 (1986); *Taylor v. List*, 880 F.2d 1040 (9th Cir. 1989).

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valadingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Insurance Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

DISCUSSION

Plaintiffs' WARN Act Claim

29 U.S.C. § 2102(a) provides that

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order —
>
> (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and
>
> (2) to the State dislocated worker unit (designated or created under title III of the Job Training

Appendix C

Partnership Act [29 U.S.C.A. § 1651 et seq.]) and the chief elected official of the unit of local government within which such closing or layoff is to occur. . . .

29 U.S.C. § 2104 (a) provides that

> (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —
>
> > (A) back pay for each day of violation at a rate of compensation not less than the higher of —
> >
> > > (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
> >
> > > (ii) the final regular rate received by such employee; and
> >
> > (B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.
>
> Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in

no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by —

> (A) any wages paid by the employer to the employee for the period of the violation;
>
> (B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and
>
> (C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

. . . .

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation

> of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

As will be discussed below, the critical inquiry in this case is how back pay damages for violation § 2102 are calculated under § 2104 (a).

A. Defendant Violated the Notice Requirements of the WARN Act

Defendant first contends that it complied with the WARN Act's notice requirements because it provided its employees with full wages and benefits for sixty days following the shutdown. Defendant concedes that it did not provide notice to the hourly employees sixty days prior to the shutdown, but argues that a technical application of the WARN Act's notice provisions should be rejected because in this case the employees had an adequate opportunity to adjust to the pending loss of their jobs and because the employees received just as much compensation as they would have received if defendant had required the employees to work through the sixty days following notice of the shutdown and closed the mill on November 26, 1994. *See Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935 (5th Cir. 1994) (fully excused leave, with pay and benefits, complies with the purposes of WARN).

This case differs from *Williams* in that *Williams* involved a mass layoff and the notice to the affected employees stated that the layoff was at least sixty days after the notice date. Furthermore, there was no evidence to support the assertion that Phillips immediately terminated the laid off employees. In the instant case, however, defendant shut down its mill

immediately after giving notice and did not place its hourly employees on "excused leave"; it merely chose to continue paying its employees and providing benefits for a sixty day period following shutdown. Although defendant provided its employees with full wages and benefits for sixty days following the mill's shutdown, defendant clearly violated the notice provision of § 2102 by failing to provide its employees with notice of the impending shutdown sixty days prior to closing its mill. Nonetheless, as will be discussed below, even though defendant technically violated the WARN Act, it is entitled to summary judgment on plaintiffs' claim because it is not liable for any further damages under the Act.

B. Defendant's Liability under the WARN Act is Offset by its Payment of its Employees' Wages and Benefits Through the Sixty Day Notice Period

An employer who violates the notice requirement of § 2102 shall be liable for "back pay for each day of violation." As set out above, § 2104 provides for reduction of the employer's liability under the Act for wages and benefits paid during the period of the violation. The parties agree that defendant paid its hourly employees for each workday in the sixty days following the mill's closure. Plaintiffs contend, however, that defendant is required to pay plaintiffs their average daily wage for each calendar-day of the violation up to a maximum of sixty days.

The issue of whether damages are calculated based on a calendar-day approach or workday approach has not been addressed by the Ninth Circuit. Resolving the dispute over the meaning of an employer's liability for violation of the Act begins with the language of the statute itself. *See Landreth*

Timber Co. v. Landreth, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301 (1985). Where the statute's language is plain, the sole function of the court is to enforce it according to its terms, except in the rare cases in which a literal application of the language will produce results demonstrably at odds with the intentions of its drafters. *United States v. Ron Pair Enter.*, 489 U.S. 235, 241-42, 109 S.Ct. 1026, 1030-31 (1989). If, however, the statute is susceptible to more than one reasonable interpretation, then it is necessary to look beyond the language to determine Congress' intent.

Section 2104 is quite detailed in providing the amount of damages an employer shall pay to its affected employees when the employer fails to provide notice of a plant closing. However, I do not agree with plaintiffs' contention that the statute is unambiguous on its face, compelling the conclusion that damages are to be calculated on the basis of calendar-days. The circuit courts that have considered the issue are split.

In *United States Workers of America v. North Star Steel Co., Inc.*, 5 F.3d 39, 42 (3rd Cir. 1993), the Third Circuit found that

> It is undisputed that the days of the violation period are "calendar-days" rather than workdays. *See* 20 C. F. R. § 639.1(a) (1992) ("[N]otice must be given at least 60 calendar-days prior to any planned plant closings or mass layoff. . . ."). In fact no section of WARN expressly refers to "workdays" as opposed to calendar-days). Thus under the plain language of the statute, a violating employer is liable for "back pay" for each of the calendar-days of the violation.

The Court also addressed the argument that the term "back pay" which precedes the phrase for "each day of violation" in

§ 2104 (a) (1) (A) connotes a lost earnings concept such that damages would not be payable for days that the affected employees would not have worked. The court found that such an interpretation would render § 2104 (a) (2) superfluous because a lost earnings concept would automatically exclude the reductions set forth in that section. *Id.* The court also found that if § 2104 (a) (2) were not rendered superfluous then it would produce the absurd result of an employer receiving double credit for any of the payments set forth in that section. *Id.* at 42-43. The court further found that if "back pay" connoted a lost earnings concept, then the employer's liability would be reduced by any earnings the employer receives during the violation period even if those earnings were received from a different employer which is not allowed under § 2104 (a) (2). *Id.* at 43.

In *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275, 1283 (5th Cir. 1994), *cert. denied,* 115 S.Ct 933 (1995), the Fifth Circuit found that § 2104 was ambiguous because "back pay" connotes a remedy that would require the payment of a sum such that the employees would be put in the same position they would have been had the violation never occurred, but the phrase "for each day of violation" appears to require payment of back pay damages for each calendar-day within the violation period. Thus, the court went on to examine the legislative history and determined that Congress intended the "back pay" language to connote the traditional back pay remedy. *Id.* at 1283-85. *See also Frymire v. Ampex Corp.*, 61 F.3d 757, 772 (10 Cir. 1995) (finding ambiguity and that a workdays damage calculation better reflects the purpose of the statute).

I find that the statute's damage provision making an employer liable for "back pay for each day of violation" is

susceptible to more than one reasonable interpretation. On the one hand, the phrase for each day of violation" especially when read in conjunction with the sentence "[s]uch liability shall be calculated for the period of the violation, up to a maximum of 60 days" and 29 C.F.R. 639.1(a) (employers must provide notification 60 calendar-days in advance of plant closing) could reasonably mean that the employer is liable for back pay for each calendar-day of violation. On the other hand, the statute could reasonably mean that an employee can receive "back pay for each day of violation," but if that employee would not have worked on particular days, for example weekends or holidays, then there would be no "back pay" to receive for those days.[3]

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3. I disagree with the Third Circuit's reasoning that such an interpretation would either render § 2104(a) (2) superfluous or absurd. If "back pay for each day of violation" only provides liability for each working day, then the reduction applied in § 2104(a) (2) would not provide a double credit. It is neither superfluous nor absurd to apply § 2104(a) (2) to a working day approach to calculating damages. For example, if an employer failed to give any notice of a plant closing it would be liable for the maximum of sixty days. *See* 29 U.S.C. § 2104 (a) (1). Within that sixty days there are forty-two working days (sixty calendar-days minus eighteen weekend days) to which the employee is entitled to back pay under § 2104 (a) (1). Assume also that the employer provides a package that pays full wages and benefits for two weeks (or ten working days pay). It is only under § 2104 (a) (2) that the employer's liability would be reduced by the "wages" it voluntarily paid (ten days of pay) and it would still be liable for the thirty-two days of "back pay" for the remaining days the employee would have worked. Using a working day concept does not suggest that the employer would first receive credit for the ten days of pay to be subtracted to compute the "back pay" under § 2104(a) (1) and then again under § 2104(a) (2). Under § 2104(a) (1) if the employee would have worked forty-two days, then there are forty-two working days for which the employer is liable, regardless of the fact that the employer provided ten days of pay during

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This is bolstered by the Supreme Court's statement that "back pay" requires "payment. . . of a sum equal to what [the employee] normally would have earned" had the violation never occurred. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197, 61 S.Ct. 845, 854 (1941).[4] Thus, it is necessary to turn to the legislative history for guidance.

In *Dillard,* the Fifth Circuit found that the legislative history made it clear that Congress intended the "back pay" language in the WARN Act to connote the traditional back pay remedy based on S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987) which states that

> [f]or violations of the notice provisions, damages are to be measured by the wages. . . *the employee would*

(Cont'd)
the sixty day violation period. It should also be noted that the court's contention in *Dillard,* 15 F.3d at 1284 n.14, that § 2104 (a) (2) does not apply in the context of a termination appears to be incorrect. *See* H.R. Conf. Rep. 100-576, 100th Cong., 2nd Sess. (1988), 1988 WL 170253 at *1361-62 (the offset provision also would apply if an employer offers employees a payment in a voluntary unconditional effort to ease the burden of termination).

Also for the same reason expressed in *Dillard,* I find unpersuasive the Third Circuit's reasoning that a lost earnings concept of back pay is inconsistent with the statute's purpose because § 2104(a) (2) does not allow the employer to deduct for wages paid by other employers. See *Dillard,* 15 F.3d at 1284 n. 14.

4. "When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 813, 109 S. Ct. 1500, 1506 (1989).

> *have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period,* less any wages or fringe benefits received from the employer during that period. This is in effect a liquidated damages provision, designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

The report clearly indicates that damages are to be calculated using the number of workdays in the violation period rather than the number of calendar-days because using the calendar-day approach would provide the employee with damages in excess of what he or she would have received had the plant remained opened. However, plaintiffs in this case point to legislative history which indicates that Congress intended to utilize a calendar-day approach to damages. For example, Senator Hatch, in raising concerns about causing incentive for litigation, indicated that damages would be calculated on a calendar-day basis: "Take, for example, a company that has had to lay off 300 workers with only a month's notice instead of two. Assuming those workers had an average wage and benefit package amounting to $20 per hour [eight hours per day], the total back pay award could equal $1,440,000." 134 Cong. Rec. 16,028. Thus, Congress' attempts to clarify the damage provision remain susceptible to both interpretations.

While both approaches have merit, I find that the workday approach better reflects the statutory purpose.[5] *See United States v. Koyomejian,* 946 F.2d 1450, 1453 (9th Cir. 1992) (if the statutory language gives rise to more than one reasonable

5. Plaintiffs note that other sections of the Act, use the phrase "period of violation" and the phrase in those sections refers to calendar-days. *See* §§ 2104 (a)(2)(A), (a)(2)(C), and (a)(3) Therefore, plaintiffs

(Cont'd)

interpretation, courts must adopt the interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested). The purpose of the WARN Act is to provide protection to workers and their families through advance notice of plant closures, so that workers and their families have some transition time to adjust to the prospective loss of employment, to seek and obtain alternative employment, and, if necessary, to seek job retraining. 20 C.F.R. § 639.1. The instant case demonstrates how the calendar-day approach may contravene that purpose:

Defendant Stone Forest Industries, as a result of restrictions on timber supply and rising costs, decided to shut down its Albany mill. Immediately following the shutdown, defendant provided each hourly employee with full benefits for the next sixty calendar-days and paid, on each regular payday, the amount the employees would have earned had the mill remained open for the sixty calendar-days. Thus, during the sixty days following shutdown plaintiffs had the opportunity to seek alternative employment and if necessary the time to enter into skill training or retraining[6] allowing the workers to compete in

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(Cont'd)
argue, it is inconsistent to use a workday approach in § 2014 (a) (1) (A). *See* Plaintiffs' Memo (#33) at 16-18. However, the phrase "period of violation" in those sections, unlike the phrase "for each day of violation" in § 2104 (a) (1) (A) is not modified by the term "back pay." Thus it is perfectly consistent to interpret the "period of violation" in terms of calendar-days while using a workday formula because during the "period of violation" there may be days in which there is no "back pay" because the employee would not have worked on those days.

6. Defendant also notified the Dislocated Worker Unit of the Oregon Development Department.

the job market. However, if an employer knew that failure to provide the sixty days of notice before closing its plant would subject it to liability for pay not only on days the employees would have worked, but also for days the employees would not have worked during the sixty days, the employer may opt to force its employees to report to their place of employment even when there is no work for them to do. In such a situation, the employees receive just as much as they would have under the workday approach, but will have much less time in which to seek new employment and/or job retraining.[7] While Congress clearly indicated that notice is an essential component of the Act, payment of full wages that would be received while at the same time allowing the employee to spend his her efforts in the full-time pursuit of alternative employment or job retraining meets the purpose of the Act.

Plaintiffs point out that another purpose of the Act is to punish the employer who fails to give notice prior to a plant closure and argue that a workday approach fails to meet that purpose. However, as stated in S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987): the workday calculation "is in effect a

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7. I am aware of Senator Metzenbaum's comment that "[a]dvance notice is essential because notice facilitates greater participation and because a functioning plant is perhaps the program's single most important resource," and that having the workers "together in the plant [is important] in order to get across to them what can be done for retraining." 134 Cong. Rec. 15,926. However, The Act does not require the employer to provide the retraining program, but does require that notice be given to the Dislocated Worker Unit. In this case, before the commencement of the sixty days in which the affected employees received full pay and benefits without the corresponding duty to report to work, the Dislocated Worker Unit was given notice. In addition, I fail to see how reporting to a job site in which there is little or no work to perform will "facilitate greater participation" in retraining.

liquidated damages provision, designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings."

In addition, adoption of a calendar-day approach could lead to anomalous results. A well-accepted rule of statutory construction requires the courts to avoid interpretations that would lead to absurd or unreasonable results. *See e.g., Haggar Co. v. Helvering,* 308 U.S. 389, 394, 60 S.Ct. 337, 339 (1940). The Fifth Circuit posed the following hypothetical demonstrating the inequities of a calendar-day approach:

> An employer violates the WARN Act by terminating employees without advance notice. Thus, the violation period contains sixty days. Employee "A" is a full time employee who works a regular eight-hour shift each weekday. However, employee "B" is a part-time employee who works just one ten-hour shift each Saturday. Under the [calendar-day] approach, employee "A" would receive 480 hours pay in lieu of notice (eight hours per day times sixty days), while part-time employee "B" would receive 600 hours pay (ten hours per day times sixty days).

Dillard, 15 F.3d at 1285. The court noted that it would be anomalous for the one-day-per-week part-time employee to receive 120 hours pay over what the full-time employee would receive. The possibilities for such inequities are limitless given that it is common to find employees with work schedules that vary from the traditional eight-hour day, forty-hour workweek. Such anomalous results do not occur under the workday approach because the employee only receives pay for the hours he or she would have worked during the sixty day violation period. *Id.* at 1285-86.

Plaintiffs contend that such an anomalous result can be avoided by construing "regular rate" in § 2104 (a) (1) (A) (i) in the same manner as in the Fair Labor Standards Act regulation in 29 C.F.R. § 778.109. Plaintiffs claim that the "regular rate" computation would mean that the employee who works one ten-hour shift per week would receive daily damages of two hours per day. *See* Plaintiffs Memo (#33) at pp. 20-21. However, a reading of 29 C.F.R. § 778.109 does not demonstrate this to be true.

The regulation states that the "regular rate" is the rate *per hour*. The hourly rate "is determined by dividing [the employee's] total remuneration for employment. . . in any workweek by the total hours actually worked by him in that workweek for which such compensation was paid." Thus, applying the definition from the regulation merely provides the hourly rate the employee receives. For example, if an employee works one ten-hour shift per week and receives $100, then the employees "regular rate" of pay is ten dollars per hour. Assuming a calendar-day approach to damages means that the employee gets damages even for days he would not have worked, then the employee is to be paid for his regular shift of ten hours every day. Thus, under the calendar-day approach and the definition of "regular rate" as stated in the FLSA regulation the employee is to be paid "back pay for each day of violation at a rate of compensation not less than the higher of. . . the average "regular rate" of ten dollars per hour for ten hours every day for the sixty day violation period. Nothing in the Act or the FLSA regulation indicates that the hours are to be averaged over a five-day workweek.

For the foregoing reasons, I find that the damages in lieu of notice under the WARN Act should be calculated according

to the workdays within the violation period. Defendant has paid the employees for the days they would have worked during the sixty day violation period. Accordingly, defendant's motion for summary judgment as to plaintiffs' first claim should be granted, plaintiffs' motion for partial summary judgment on the claim should be denied and the claim should be dismissed.[8]

Plaintiffs' Oregon Wage Claim Act

Plaintiffs' second amended complaint also alleges that defendant failed to pay them their earned wages at the time of their discharge as required by ORS § 652.140. Jurisdiction over this claim is based on supplemental jurisdiction by virtue of 28 U.S.C. § 1367 because the claim arises out of the same case or controversy as their federal WARN Act claim. The WARN Act claim in this action should be dismissed. As such, the court should decline to exercise supplemental jurisdiction over plaintiffs' state law claim and it should be dismissed. 28 U.S.C. § 1367 (c) (3); *United Mine Workers v. Gibbs,* 383 U.S. 715,

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8. Moreover, defendant has proven to the satisfaction of this court that its failure to give notice as prescribed by the Act was in good faith because the employer had reasonable grounds for believing that the payment of full benefits and wages for sixty days following the shutdown was not a violation of the Act. *C.F. Williams v. Phillips Petroleum Co.,* 23 F.3d 930, 935 (5th Cir. 1994) (fully excused leave, with pay and benefits, complies with the WARN Act. In addition, defendant has complied in good faith with the objective of the Act. *See Assoc. of Western Pulp and Paper Workers v. ITT Rayonier,* 1994 U.S. Dist. Lexis 13094, *26 (W.D.Wash. 1994). Therefore, even if damages were to be calculated on a calendar-day basis, defendant's good faith believe that it had not violated the Act should lead the court, in its discretion, to reduce defendant's liability to the amount already paid to its employees. *See* 29 U.S.C. § 2104(a) (4).

726 (1966); *Schneider v. TRW Inc.*, 938 F.2d 986, 993-994 (9th Cir. 1991).

CONCLUSION

For all the foregoing reasons, defendant's motion (#35) for summary judgment as to plaintiffs' WARN Act claim should be granted and plaintiffs' motion (#33) for partial summary judgment should be denied. In addition, plaintiffs' state law claim should be dismissed and this action should be dismissed.

DATED this 21st day of March, 1996.

s/ Thomas M. Coffin
THOMAS M. COFFIN
United States Magistrate Judge

APPENDIX D — BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN *CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, et al. v. DILLARD DEPARTMENT STORES, INC., et al.*
FILED JANUARY 4, 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1857

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, ET AL., PETITIONERS

v.

DILLARD DEPARTMENT STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Appendix D

QUESTION PRESENTED

Section 5(a)(1)(A) of the Worker Adjustment and Retraining Notification Act provides that an employer who orders a plant closing or mass layoff in violation of the Act's 60-day notification requirement, 29 U.S.C. 2102, "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for * * * back pay for each day of violation." 29 U.S.C. 2104(a)(1)(A). The question presented is whether this provision entitles aggrieved employees to damages for each calendar day of the violation, or only for each work day on which the employees would have earned wages if no violation of the Act had occurred.

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Appendix D

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1857

CARPENTERS DISTRICT COUNCIL OF NEW ORLEANS AND VICINITY, ET AL., PETITIONERS

v.

DILLARD DEPARTMENT STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. 2101 *et seq.*, prohibits covered employers, with exceptions not relevant here, from ordering "a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice" of such action to each representative of affected employees, or, in the absence of such a representative, to each employee. 29 U.S.C. 2102(a)(1). The employer is also required to provide

notice to designated state and local officials. 29 U.S.C. 2102(a)(2). Section 2(a) of the Act identifies those plant closings or mass layoffs for which an employer must give notice according to the number of employees affected, 29 U.S.C. 2101(a)(2) and (3), and defines such employees as those who "may reasonably be expected to experience" an "employment loss," including termination, a layoff longer than six months, or a greater than 50 percent reduction in work hours for each of six months, 29 U.S.C. 2101(a)(5) and (6).

Section 5(a)(1)(A) of the Act provides that an employer who violates the statutory notice requirement "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for * * * back pay for each day of violation." 29 U.S.C. 2104(a)(1)(A). That provision also specifies the "rate of compensation" by which back pay is to be measured as no less than the higher of the employee's "average regular rate * * * during the last 3 years of * * * employment," 29 U.S.C. 2104(a)(1)(A)(i), or the employee's "final regular rate," 29 U.S.C. 2104(a)(1)(A)(ii). Statutory liability extends for a maximum of 60 days, but no more than one-half the number of days for which the aggrieved employee was employed. 29 U.S.C. 2104(a)(1). Section 5(a)(2) provides that a noncomplying employer's liability to an aggrieved employee may be reduced by "wages paid by the employer to the employee for the period of the violation," and by "any voluntary and unconditional payment" from the employer to the employee that does not result from "any legal obligation." 29 U.S.C. 2104(a)(2)(A) and (B).[1] The WARN Act does not provide,

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[1] In addition, Section 5(a)(1)(B) makes the employer liable to each aggrieved employee for "benefits under an employee benefit plan" that the employee would have received "if the employment

however, for a reduction in damages for wages earned during the violation period from another employer.[2]

2. On May 9, 1989, respondent D.H. Holmes Co., Ltd., which was in poor financial condition, became a wholly owned subsidiary of respondent Dillard Department Stores, Inc., by means of a merger. Pet. 4; Pet. App. A2-A4, A42. That merger resulted in the layoff of approximately 800 Holmes employees between May and August 1989. Pet. 5; Pet. App. A43-A44. Approximately 700 of those employees received less than 60 days' notice of their impending layoff. Pet. 5. Recognizing that it had failed to give sufficient notice under the WARN Act, Dillard purported to comply voluntarily with the Act's damages provision by identifying those employees it believed to be covered by the Act, and paying them for the days they would have worked had it given sufficient notice, minus any outstanding severance or vacation pay. *Ibid.*; Pet. App. A4-A5, A44.

3. Petitioners, a class of former employees who were terminated as a result of the merger and who did not receive the requisite notice, filed suit in federal district court against respondents, several of respondents' individual officers and directors, and their fiduciary liability insurer. Pet. App. A5-A6, A41, A70. On petitioners' motion for partial summary judgment, the magistrate judge determined that respondents' failure to

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loss had not occurred." 29 U.S.C. 2104(a)(1)(B). Correspondingly, Section 5(a)(2)(C) permits a reduction in the amount owed for any payment made by the employer to a third party or trustee "on behalf of and attributable to the employee" for the violation period. 29 U.S.C. 2104(a)(2)(C).

[2] Section 5(a)(3) of the Act also provides for "a civil penalty of not more than $500 for each day of * * * violation" against any employer who fails to give the requisite notice to a unit of local government. 29 U.S.C. 2104(a)(3).

provide the requisite notice violated the Act, as neither of the two statutory exemptions to the Act's notice requirement, see 29 U.S.C. 2103, was applicable. Pet. App. A59. The court concluded that Section 5(a)(1) provides "a penalty for fail[ure] to give adequate notice," *id.* at A61, and that Congress had expressed a "clear" intent under that provision to provide damages for every calendar day within the violation period, *id.* at A63. After a separate trial, see *id.* at A44, the court awarded petitioners $1,262,050.10 in damages, together with pre-judgment interest and attorneys' fees. Pet. 6; Pet. App. A89, A90.

4. The court of appeals reversed in relevant part, holding that Section 5(a)(1) entitles aggrieved employees to damages only for lost work days within the statutory violation period. It acknowledged that the Act is "susceptible to more than one reasonable interpretation," and that its decision conflicts with the Third Circuit's contrary holding in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), that Section 5(a)(1) requires payment for every calendar day within the violation period. Pet. App. A16. The court of appeals, however, placed substantial reliance on decisional law holding that "the term 'back pay' commonly means *pay* * * * that an employee would have earned * * * if the event that affected such job related compensation had not occurred." *Id.* at A16-A17 (citing *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941)). The court observed that "[i]f aggrieved employees are paid only for days they ordinarily would have worked during the sixty-day notice period, then those employees are placed in the position they would have occupied had the violation never occurred." *Id.* at A17.

In the Fifth Circuit's view, the legislative history also showed that back pay under the Act "connote[s] the traditional back pay remedy as discussed in *Phelps Dodge*." Pet. App. A19. The court relied for this conclusion on the Senate Report accompanying a predecessor version of the Act, which stated that "damages are to be measured by the wages * * * the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period." *Id.* at A20 (quoting S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987)).

DISCUSSION

The decision of the court of appeals is erroneous and conflicts directly with the Third Circuit's resolution of the same question. Uniform application of the WARN Act is important if the Act is to fulfill its prophylactic purpose. The petition for a writ of certiorari should therefore be granted.

1. The court of appeals in this case primarily relied on its perception that "the term 'back pay' commonly means *pay*, *i.e.*, wages, benefits, etc., that an employee would have earned, or to which she would have otherwise been entitled, if the event that affected such job related compensation had not occurred." Pet. App. A16. We acknowledge that the term "back pay," as used in other statutes, typically connotes a remedy based on the wages that an employee would have earned if no violation of law had occurred. See, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941) (National Labor Relations Act); *United States* v. *Burke*, 112 S. Ct. 1867, 1873-1874 (1992) (Title VII). In our view, however, three features of the statutory scheme at issue here indicate that a WARN Act damage award was intended to serve significant noncompensatory purposes, and that the

award should be calculated for each calendar day of the violation.

a. The Act provides that an aggrieved employee is entitled to back pay for "each day of violation." 29 U.S.C. 2104(a)(1)(A). Read in the context of the Act as a whole, it is clear that "each day" can only mean "each calendar day," not "each work day." The Act operates according to calendar days, and makes no reference at all to work days. Thus, the employer is forbidden to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order," 29 U.S.C. 2102(a), and it is undisputed that this provision entitles employees to notice 60 calendar days prior to the plant closing or layoff, without regard to the employees' (potentially varying) work schedules within that 60-day period.[3] Moreover, the concluding sentence of 29 U.S.C. 2104(a)(1), which follows the specification of the manner in which compensation for "each day of violation" is to be calculated, states that the employer's liability shall be calculated "for the period of the violation," up to a maximum of 60 days, but in no event more than one-half the number of days for which the employee was employed by the employer.[4] Thus, under the Act, the term "period of the violation" identifies the time frame for which the employer is liable. The amount of compensation, however, is calculated for "each day" of that period at the specified "rate of compensation."

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[3] Indeed, a requirement that notice be given 60 work days prior to a plant closing or mass layoff would substantially expand the employer's obligations under the Act.

[4] Compare also 29 U.S.C. 2104(a)(2)(A) and (C) and the final sentence of 29 U.S.C. 2104(a)(2) (providing for the offset of wages and for health and pension contributions attributable to "the period of the violation").

The Act also provides for a civil penalty, payable to an affected "unit of local government," in an amount not to exceed "$500 for each day of such violation." 29 U.S.C. 2104(a)(3). Respondents acknowledge (Br. in Opp. 10) that, "[v]ery clearly, Congress meant for an employer to be subject to a $500 a day penalty, regardless of whether employees worked on those days or not." It is unlikely that the term "each day" was intended to have different meanings and consequences in Sections 2104(a)(1)(A) and 2104(a)(3).[5] See, *e.g.*, *Commissioner* v. *Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2011 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the

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[5] The Conference Report states that "if the employer provides 20 days notice, then the maximum violation period for purposes of calculating back pay awards or civil fines would be 40 days. ('Violation period' refers to the period of time after a shutdown or layoff in violation of this Act, and extends for the number of days that notice was required but not given.)." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988). That passage makes clear that (1) back pay and civil fines are to be awarded for the same number of days, and (2) that number is to be determined by subtracting from 60 the number of days for which notice was given.

The Conference Report initially accompanied H.R. 3, 100th Cong., 1st Sess. (1987), which included plant-closing provisions. H.R. 3 passed the Congress in 1988 but was vetoed by President Reagan. The plant-closing provisions were subsequently passed separately in the WARN Act, Pub. L. No. 100-379, 102 Stat. 890 (1988). Because the WARN Act is "identical to the plant closing provision" included in H.R. 3, see 134 Cong. Rec. 14,983 (1988) (Sen. Metzenbaum), the legislative history of H.R. 3's plant-closing provisions should be treated as the legislative history of the WARN Act. See also Omnibus Trade and Competitiveness Act of 1988 (OTCA), Pub. L. No. 100-418, § 2, 102 Stat. 1119 (providing that the legislative history of H.R. 3, including the Conference Report, should be treated as the legislative history of the OTCA).

same meaning.") (citations and internal quotation marks omitted). The court of appeals therefore was mistaken in concluding that application of the Act's back pay provision "requires a calculation using the number of work days in the violation period rather than the number of calendar days." Pet. App. A20.

b. The Act provides that the amount of back pay for which a noncomplying employer is liable shall be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. 2104(a)(2)(A). The Conference Report states explicitly what is implicit in that statutory text: "[T]he only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compensation payments received from the State, may not be used to offset the remedy." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1053 (1988).

In order to ensure that a backpay award places an aggrieved employee in the same position he would have occupied but for the employer's unlawful action, computation of the award ordinarily entails an offset for wages earned from another employer. See, *e.g.*, *Phelps Dodge*, 313 U.S. at 197-198;[6] 5 U.S.C. 5596(b)(1)(A)(i) (federal employee aggrieved by unjustified personnel action is entitled to receive "an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have

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[6] Indeed, in *Phelps Dodge* the Court held that the National Labor Relations Board had erred in deducting only those sums actually earned from other employers, and in failing to deduct additional sums that the employee might have earned through reasonable diligence. 313 U.S. at 197-198. The Court explained that, "[s]ince only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Id.* at 198.

earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period"). The court of appeals recognized that the WARN Act's back pay provision diverges in this significant respect from the method by which back pay is ordinarily computed, see Pet. App. A18-A19 n.14, but in our view the court failed to draw the appropriate inference from that divergence. The absence of an offset for wages earned from another employer demonstrates that a WARN Act damage award is intended to serve substantial noncompensatory purposes—that Congress's intent to deter and punish violations of the Act (and to ensure that employees have the security of continuing their existing employment for each day of the 60-day notice period) has been given precedence over any desire to ensure that aggrieved employees receive only the same earnings that they would have received had no violation occurred.

c. The legislative history also shows that Congress's purpose went beyond the compensation of affected workers for earnings lost as a result of premature plant closings. An amendment introduced by Senator Quayle would have permitted employers to comply with the Act by giving "severance pay in lieu of notice." 134 Cong. Rec. 15,926 (1988).[7] In opposing the amendment, Senator Metzenbaum—the Act's principal sponsor—empha-

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[7] Even the Quayle amendment would have provided that the severance pay would be in "an amount equal to the employee's compensation as computed under section [5(a)(1)] multiplied by the number of days that the requisite notice was not given," 134 Cong. Rec. 15,926 (1988)—a formulation that would have made back pay under the Act awardable for each calendar day of the violation, whether or not an aggrieved employee would have worked and earned wages.

sized that "the bill is about giving notice. It is not a mandatory severance bill." *Id.* at 15,928. Senator Metzenbaum noted that, "[a]s stated by the National Academy of Sciences, * * * it is the notice that is essential to successful worker adjustment programs. It is the notice that gives the employee the chance to make other arrangements." *Ibid.* Senator Metzenbaum made clear, moreover, that payment of the wages that an employee would have earned absent the violation would not be an adequate substitute. Quoting from the report of a task force headed by Secretary of Labor Brock, the Senator explained that "[a]dvance notice is essential because notice facilitates greater participation and because a functioning plant is perhaps the [job retraining] program's single most important resource." *Ibid.* Congress's rejection of the Quayle amendment signaled its agreement that the WARN Act was intended, first and foremost, to induce employers to provide the notice that would enable workers to obtain job counseling and retraining at a time when the plant was still operational. An award of damages for each calendar day of the violation better effectuates that prophylactic purpose than does the approach adopted by the Fifth Circuit in the instant case.

2. The court of appeals also expressed the view that its reading of the Act was supported by (a) the anomalous results that it believed would be produced by a contrary interpretation, and (b) the Senate Report accompanying a predecessor version of the Act. The court of appeals' reliance on those considerations was misplaced.

a. Under the WARN Act, back pay is to be assessed at a rate not less than the higher of "the average regular rate received by [the] employee during the last 3 years of the employee's employment" or "the final regular rate received by [the] employee." 29 U.S.C. 2104(a)(1)(A)(i)

and (ii). The term "regular rate" derives from the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and the compensation scheme embodied in subsections (i) and (ii) of Section 5(a)(1)(A) of the WARN Act comes verbatim from Section 7(*o*)(4) of the FLSA, 29 U.S.C. 207(*o*)(4). See Pet. 19.[8] Under the FLSA, an employee's "regular rate" is used to determine the minimum amount of overtime pay to which the employee is entitled for work in excess of 40 hours in a work week. See 29 U.S.C. 207(a). That rate includes all amounts paid to the employee, 29 U.S.C. 207(e), and is an "hourly rate" computed "by dividing [the employee's] total remuneration for employment * * * in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid," 29 C.F.R. 778.109.

Although the WARN Act specifies the manner in which an employee's hourly rate is to be determined, it does not state the number of hours for which an

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[8] Although the WARN Act does not authorize the Secretary of Labor to institute enforcement actions, it directs the Secretary to "prescribe such regulations as may be necessary to carry out" the Act, including, "at a minimum, * * * interpretative regulations" concerning satisfactory service of notice. 29 U.S.C. 2107(a). Pursuant to that authority, the Secretary has promulgated regulations at 20 C.F.R. Pt. 639. When promulgating those regulations, the Secretary expressed his intent to "rely on the definitions found in the FLSA." 54 Fed. Reg. 16,049 (1989). Those regulations do not address the calculation of damages under the WARN Act. Nevertheless, the position of the Secretary set forth in this brief regarding the proper interpretation of the phrase "back pay for each day of violation" is entitled to substantial deference. Cf. *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988) (agency's interpretation of its own regulation is entitled to deference even when that interpretation had not been asserted prior to the lawsuit in question).

employee should be credited in computing his damages for a given day. The court of appeals assumed that if the Act were read to entitle aggrieved employees to back pay for every calendar day of the violation, a worker's award for each day would be based upon the number of hours in that employee's regular shift. See Pet. App. A20-A22. The court was concerned that that method of calculation would produce anomalous and unfair results, because an employee who had worked a ten-hour shift one day per week would receive a higher WARN Act award than would an employee who had worked five eight-hour shifts per week. *Ibid.*[9]

The court of appeals erred, however, in assuming that, under a "calendar day" approach, a part-time employee's back pay award would be computed by reference to the number of hours in his typical shift. Rather, equitable treatment of full- and part-time workers is ensured by averaging each employee's weekly hours over the typical five-day work week. Thus, a part-time employee who worked a ten-hour shift one day per week would receive daily damages at his or her hourly "regular" rate for two hours of work per day, while a full-time employee would receive daily damages at his or her hourly "regular" rate for eight hours of work per day. The amount owed to such employees would then be calculated by multiplying the daily damages by the number of calendar days in the violation period (minus any statutory reductions). Under that formulation, a part-time employee is entitled to daily damages proportionally lower than those to

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[9] The Third Circuit in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), referred to the same hypothetical scenario but declined to determine how those employees' WARN Act awards would be computed. See 5 F.3d at 43 & nn.6-7.

which a full-time employee is entitled, and all full-time (*i.e.*, 40-hour-per-week) employees are treated equivalently regardless of their work schedules. Compare Pet. App. A21-A22 & n.16. Indeed, it appears that this method of computing damage awards was employed in the instant case. See Pet. 20. The court of appeals' limitation of damages to days on which a particular employee would have worked is therefore unnecessary to prevent anomalous and inequitable treatment of employees who have different work schedules.

b. The court of appeals also placed substantial reliance (see Pet. App. A19-A20) on the Senate Report accompanying a predecessor version of the Act.[10] That report stated:

> For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) the employee would have received had the plant remained open or the layoff been deferred until the conclusion[] of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987).

Although the first sentence of this passage, standing alone, lends support to the conclusion of the court of appeals, the court failed to recognize that other, more

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[10] That version included the "back pay for each day of violation" and "regular rate" formulations, but its treatment of fringe benefits differed somewhat from the statute as later enacted. See S. Rep. No. 62, 100th Cong., 1st Sess. 68 (1987).

contemporaneous, aspects of the legislative history point in the opposite direction. The Conference Report, for example, "clarif[ied] that for each day of violation, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff, as set forth in section [5(a)(1)]." H.R. Conf. Rep. No. 576, *supra*, at 1052.[11] As one of the Act's co-sponsors stated, "[r]emedies for violation are limited to money damages—the equivalent of a day's wages and fringe benefits for each day of violation for each affected employee." 134 Cong. Rec. 15,516 (1988) (Sen. Kennedy); see also *id.* at 17,867 (Rep. McCrery) (employer's liability for "a day's wages for every day of notification not given" not relieved by fulfillment of contractual obligations); *id.* at 16,028 (Sen. Hatch).[12] As discussed above (see pages 9-10, *supra*), moreover, the Act's principal sponsor emphasized that severance payments would not be an acceptable substitute for the notice

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[11] The Conference Report also uses identical language in describing the employer's liability for back pay and for the civil penalty owed to the local government (which concededly is owed for each calendar day of the violation, see page 7, *supra*). Thus, the Conference Report stated that the Senate bill (which the conferees adopted in relevant part) "provides that an employer which violates the notice provisions of [29 U.S.C. 2102] is liable for back pay and a civil fine for 'each day of violation.'" H.R. Conf. Rep. No. 576, *supra*, at 1052.

[12] In discussing the back pay awards possible under the Act, Senator Hatch stated: "Take, for example, a company that has had to lay off 300 workers with only a month's notice instead of two. Assuming those workers had an average wage and benefit package amounting to $20 per hour, the total back pay award could equal $1,440,000." 134 Cong. Rec. 16,028 (1988). Senator Hatch's calculations assume that back pay under the Act would be awarded for eight hours for each calendar day of the violation (300 workers X 30 days/worker X 8 hours/day X $20/hour equals $1,440,000).

required by the Act, and the rejection of the Quayle amendment suggests that the Senate agreed with that view. The court of appeals therefore erred in concluding that the legislative history, taken as a whole, reflects a congressional determination that "back pay for each day of violation" should be limited to days on which an aggrieved employee would have worked if the violation had not occurred.

3. The question presented in this case warrants review by this Court. As the Fifth Circuit acknowledged, see Pet. App. A16, A20-A21, its decision conflicts directly with that of the Third Circuit in *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (1993), cert. denied, 114 S. Ct. 1060 (1994), which held that, "under the plain language of the statute, a violating employer is liable for 'back pay' for each of the calendar days of the violation." *Id.* at 42. The district courts also disagree as to whether injured employees are entitled under the WARN Act to damages for each calendar day of the violation, or only for lost work days. Compare *Frymire* v. *Ampex Corp.*, 858 F. Supp. 1081, 1084 (D. Colo. 1994) (damages awardable for each calendar day); *Joshlin* v. *Gannett River States Publishing Corp.*, 840 F. Supp. 660, 663 (E.D. Ark. 1993) (same); *Wholesale & Retail Food Distribution Local 63* v. *Santa Fe Terminal Servs., Inc.*, 826 F. Supp. 326, 331 (C.D. Cal. 1993) (same, in dictum) and *United Electrical Workers* v. *Maxim, Inc.*, 5 IER Cas. (BNA) 629, 631-632 (D. Mass. May 15, 1990) (same) with *Washington* v. *Aircap Indus., Inc.*, 860 F. Supp. 307, 311-313 (D.S.C. 1994) (damages not awardable for non-work days) and *Jones* v. *Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292, 1296 (same), amended in part, 753 F. Supp. 218 (E.D. Tenn. 1990).

However this conflict is resolved, the WARN Act should be uniformly interpreted and applied. The significant number of cases addressing this issue since the WARN Act's enactment attests to its importance, and the wide disagreement among the district courts suggests that the question will ultimately require resolution by this Court. Moreover, coupled with the Act's liberal venue provision, which permits a suit in "any district in which the violation is alleged to have occurred, or in which the employer transacts business," 29 U.S.C. 2104(a)(5), the current conflict is an invitation to widespread forum shopping.[13]

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[13] For instance, an employee who is terminated as the result of a plant shut-down in Louisiana, without the notice required by the WARN Act, could bring suit in the more favorable Third Circuit if the employer happens to "transact[] business" in Pennsylvania, while one whose employer's only business is within Louisiana could not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1995